

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of:
Trademark Application Serial No. 75/434,462
Filed February 13, 1998
For the Mark "BEAR DESIGN"
Published in the Official Gazette on July 13, 1999 at TM 77

THE VERMONT TEDDY BEAR COMPANY,)
INC.,)
)
Opposer,)
)
v.) Opposition No. 115,198
)
BUILD-A-BEAR WORKSHOP, INC.,)
)
Applicant.)

06-18-2004

U.S. Patent & TMO/TM Mail Rpt Dt. #22

**OPPOSER'S EMERGENCY MOTION TO PERMIT FURTHER DISCOVERY
PURSUANT TO FED.R.CIV. P56(f) TO FACILITATE RESPONSE TO
MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR EXTENSION OF
DEADLINE TO RESPOND TO MOTION FOR SUMMARY JUDGMENT**

Opposer, THE VERMONT TEDDY BEAR COMPANY, INC., (hereinafter referred to as "VTB"), moves the Honorable Trademark Trial and Appeal Board (TTAB or the Board) for an Order permitting VTB to depose Maxine Clark, President of Applicant BUILD-A-BEAR WORKSHOP, INC. (BABW or Applicant), before responding to the Motion for Summary Judgment filed on June 15, 2004, the service copy of which was received on that same date.

Opposer further moves the Board for an Order extending Opposer's deadline for response to Applicant's Motion for Summary Judgment.

A Memorandum of Points and Authorities, Declaration of Opposer's Counsel, Exhibits and Proposed alternative Orders accompany this Motion.

Respectfully submitted,

H. JAY SPIEGEL & ASSOCIATES

A handwritten signature in dark ink, appearing to read "H. Jay Spiegel", is written over a horizontal line.

H. Jay Spiegel
Attorney for Opposer
THE VERMONT TEDDY BEAR COMPANY,
INC.

Registration No. 30,722

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THE VERMONT TEDDY BEAR COMPANY,)	
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v.)	Opposition No. 115,198
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BUILD-A-BEAR WORKSHOP, INC.,)	
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Applicant.)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
OPPOSER'S EMERGENCY MOTION TO PERMIT FURTHER DISCOVERY
PURSUANT TO FED.R.CIV. P56(f) TO FACILITATE RESPONSE TO
MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR EXTENSION OF
DEADLINE TO RESPOND TO MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Opposer, THE VERMONT TEDDY BEAR COMPANY, INC., (hereinafter referred to as "VTB"), herewith submits to the Honorable Trademark Trial and Appeal Board (TTAB or the Board) this Memorandum of Points and Authorities in support of VTB's Motion for an Order permitting VTB to depose Maxine Clark, President of Applicant BUILD-A-BEAR WORKSHOP, INC. (BABW or Applicant), before responding to the Motion for Summary Judgment filed on June 15, 2004, the service copy of which was received on that same date.

Opposer concurrently moves the Board for an Order extending Opposer's deadline for response to Applicant's Motion for Summary Judgment.

On April 16, 2004, Opposer mailed a Notice of Deposition (see Exhibit 1) to Applicant noticing the deposition of Maxine Clark, Applicant's president, to be conducted on June 22, 2004, 9 weeks hence, beginning at 9:00 AM, in Applicant's Counsel's office in St. Louis, Missouri. The date, time and place of the deposition were pre-arranged with Applicant's Counsel, Michelle Alvey.

After over 4 years of settlement negotiations, discovery in this matter commenced in the Fall of 2003. Opposer sent documents it reasonably believed responded to Applicant's discovery requests on May 5, 2004. The letter of transmittal accompanying those documents is attached hereto as Exhibit 2. On May 13, 2004, Applicant's Counsel sent Opposer's Counsel a letter (see Exhibit 3) explaining what Applicant perceived were deficiencies in Opposer's Interrogatory answers and Document production. After reviewing the letter, Exhibit 3, Opposer's Counsel forwarded the letter to VTB and began contacting the Assistant to the President of Opposer, Courtney Griesser, to inquire concerning Applicant's requested clarifications and augmentations and as to whether additional documents could be uncovered that would respond to the concerns expressed in Applicant's Counsel's letter. See Spiegel Dec. at 3.

While Opposer's Counsel diligently pursued seeking the additional information, Opposer's Counsel was aware (see Spiegel Dec. at 4) that the time period from mid-May to the end of June is one of the busiest times of the year for Opposer given the high volume of teddy bear orders that Opposer receives coincidental with the Mother's Day and Father's Day holidays as well as the numerous high school, college and graduate school graduation ceremonies, all of which occur during this time of year. Due to these factors, staffpersons who must assist Ms. Griesser in searching for relevant documents have been unavailable. As such, Ms. Griesser has been unable to complete VTB's further search for additional documents nor to provide clarifications to comply with all of Applicant's requests (see Griesser Dec. at 5). However, Opposer's Counsel has been assured that whatever clarifications may be provided and whatever additional documents might be produced will be furnished as soon as practicable. See Griesser Dec. at 6.

On more than one occasion, Opposer's Counsel has communicated with Applicant's Counsel to explain why Opposer has been unable to quickly respond to Applicant's Counsel's letter of May 13, 2004. In this regard, Exhibit 4 is a copy of Opposer's Counsel's letter of May 14, 2004 expressing the intent to provide the requested information by the end of the week of May 24, 2004. Subsequently, when Opposer's Counsel found that Opposer was unable to take the time away from its busy season to fully address Applicant's concerns by the end of the week of May 24, 2004, Opposer's Counsel

telephoned Applicant's Counsel to explain the problem and express Opposer's intent to comply with Applicant's requests as soon as practicable. See Spiegel Dec. at 5. More than one such conversation took place. See Spiegel Dec. at 5.

At no time did Opposer express to Applicant that Opposer would refuse to comply with the requests set forth in Applicant's Counsel's letter of May 13, 2004. In fact, Opposer's Counsel consistently expressed Opposer's intent to fully comply. See Spiegel Dec. at 5.

On June 14, 2004, Opposer's Counsel received a telephone call from Applicant's Counsel, Michelle Alvey, in which Ms. Alvey explained that she had reviewed all of Opposer's discovery production over the previous weekend, and had concluded that it would be appropriate to file a Motion for Summary Judgment concerning the issue of whether Opposer has been using its claimed Trademark and Service Mark in a manner in compliance with the Lanham Act. See Spiegel Dec. at 6. Opposer's Counsel explained that the requested information would be forthcoming in the near future and that it would be inappropriate to file a Motion for Summary Judgment under circumstances where Applicant was aware that additional discovery was forthcoming.¹ The same day, Opposer's Counsel sent Applicant's Counsel a letter confirming in writing the

¹Both parties served their initial discovery requests within 10 days of one another. As recently as June 4, 2004, Applicant served over 450 pages of documents on Opposer, barely 10 days prior to the date on which Applicant mailed in their Motion for Summary Judgment. See Exhibit 5.

reasons why the supplemental discovery had not yet been produced. See Exhibit 6.

Instead of waiting a reasonable period of time after the most recent production of over 450 documents by Applicant (Exhibit 5), and instead of filing a Motion to Compel Production if Applicant thought Opposer would not be forthcoming with the additional discovery requested, with incomplete information in hand, Applicant decided, instead, to file and serve a Motion for Summary Judgment, that was received barely one week before the date of Maxine Clark's Deposition which had been scheduled, by agreement between the parties, over 8 weeks earlier.

Opposer apologizes to the Board for this lengthy recital of the background, however, Opposer believes it is important for the Board, in considering whether to grant the accompanying Motion, to understand the context under which the Motion for Summary Judgment was filed.

II. THE LAW CONCERNING MOTIONS UNDER FED.R.CIV. P56(f)

A party that believes that it cannot effectively oppose a Motion for Summary Judgment without first taking discovery may file a request with the Board for time to take the needed discovery. TBMP § 528.06. The request must be supported by an affidavit showing that the non-moving party cannot, for reasons stated, present by affidavit facts essential to justify its opposition to the motion. *Id.* Also see Fed.R.Civ. P56(f) and *Opryland USA Inc.*

v. *Great American Music Show Inc.*, 23 USPQ 2d 1471 (Fed. Cir. 1992). In lieu of an affidavit, a party may submit a declaration meeting the requirements of 37 C.F.R. § 2.20. TBMP § 528.06.

Rule 56 provides nonmovants with protection from being "railroaded" by premature summary judgment motions. *Opryland*, 23 USPQ 2d at 1475, citing *Celotex v. Catrett*, 477 U.S. at 326. When discovery is reasonably directed to "facts essential to justify the party's opposition," in the words of Rule 56(f), such discovery must be permitted or summary judgment refused. *Opryland*, 23 USPQ 2d at 1475, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986).

III. ARGUMENT

Applicant's Motion for Summary Judgment (Applicant's Motion) was filed alleging that the sole basis for Opposer's opposition to registration of Applicant's mark is that Opposer was using the same mark earlier and thus has prior rights to those claimed by Applicant. Applicant contends, in Applicant's Motion, that Opposer's use is merely "ornamental or decorative use" not rising to the level of trademark use and, as such, "does not give VTB any trademark rights that can be used as the basis for this opposition." See Applicant's Memorandum in Support of Motion for Summary Judgment (Applicant's Memo) at 2. Opposer contends that the deposition of Maxine Clark will result in the eliciting of information supporting Opposer's contention that its use of its

mark is trademark/service mark use and was prior in time to that of Applicant.

Concerning the issues raised in Applicant's Motion and the accompanying Memorandum, Opposer wishes to depose Applicant's President in two respects:

(a) Opposer wishes to question Applicant's President concerning the manner by which Applicant has used the mark for which Applicant filed the application that is the subject of this Opposition proceeding.² While Applicant's application was based upon an alleged bona-fide intent to use the mark in association with the claimed goods and services, in fact, Applicant contends in this Opposition proceeding that their bona-fide use of the alleged mark first occurred prior to the date on which Applicant's application was filed. Through the testimony of Maxine Clark, Opposer believes that an analogy will be able to be drawn between Applicant's manner of use of their mark, which they claim is Trademark use, and Opposer's use of their mark which Applicant contends in Applicant's Motion and Memorandum is merely ornamental or decorative. Such information, when elicited, will permit Opposer to strongly support Opposer's position that Opposer's use of its mark is Trademark use and will permit Opposer to challenge the credibility of Applicant's argument that it is not.

²Application Serial No. 75/434,462 filed February 13, 1998.

(b) Opposer wishes to question Applicant's President concerning the precise circumstances under which Applicant allegedly created their mark and began to use it. If it can be shown that there is an issue of fact concerning whether Applicant was aware of the existence of Opposer's use of its mark when Applicant adopted and began using its mark, as a matter of law, Opposer will be able to establish, in response to the Motion for Summary Judgment, that there is an issue of fact, mitigating in Opposer's favor, concerning whether Opposer's placement of a heart inside the chest of a stuffed teddy bear constitutes Trademark and Service Mark use.

In this regard, the Board's attention is directed to *McCarthy on Trademarks*, § 7:34 where the following is stated:

"When a distinctive symbol appears in use by a junior user, it suggests an inference of conscious imitation. As one court stated of defendant's use of an involved geometric design:

'Why, out of the exhaustless variety of geometric figures and of methods of grouping should the defendant Dickinson have adopted figures and grouping substantially like those of plaintiff's mark? A purpose to appropriate a trademark in substantial part could scarcely be more manifest.'"

The case quoted by *McCarthy* is *O. & W. Thum Co. v. Dickinson*, 245 F. 609, 614 (6th Cir. 1917).

Thus, proof of copying, which can only be elicited through the testimony of Maxine Clark, raises a substantial issue of fact

favoring Opposer that the mark that was copied is, in fact, a Trademark.

IV. PROPOSED PARAMETERS FOR THE DEPOSITION OF MAXINE CLARK

As explained above, the deposition of Maxine Clark was noticed 9 weeks in advance. One week prior to the scheduled date of the deposition, Applicant filed a Motion for Summary Judgment and now seeks to preclude Opposer from deposing Ms. Clark until after Applicant's Motion is decided. Given the preparation that Opposer's Counsel has undertaken, which began well before Opposer received service of Applicant's Motion, Opposer would prefer to fully depose Ms. Clark on all subjects for which the deposition was sought. However, should the Board approve Opposer's Motion but decline to permit Opposer to depose Ms. Clark concerning subjects over and above those enumerated above, given the time and expense spent by Opposer, some of which will now be wasted, and given the Board's lack of authority to compensate Opposer monetarily, Opposer requests that subsequent to the Board's decision on Applicant's Motion, presuming Applicant's Motion is denied, the Board order that Ms. Clark complete her deposition in the Washington, D.C. metropolitan area at a date, time and place to be agreed upon by the parties during the extended discovery period.

In either event, whether or not the Board grants the accompanying Motion, given the fact that Opposer has had to address the issue of Ms. Clark's deposition instead of the pending Summary Judgment Motion, Opposer requests that the Board grant Opposer a

two week extension of the deadline to respond to Applicant's Motion, namely, to and including July 16, 2004. This extension is requested to also permit Opposer to supplement its discovery, in response to Applicant's Counsel's letter of May 13, 2004, concurrently with responding to Applicant's Motion. In this regard, Opposer's Counsel would agree by Stipulation to a reasonable extension of the deadline for Applicant to reply to Opposer's Response, given the fact that there will likely be new evidentiary material for Applicant to digest.

V. CONCLUSION

For the reasons set forth above, Opposer requests that the Board grant Opposer's Motion and enter an Order such as one of the alternative proposed Orders submitted herewith.

Respectfully submitted,

H. JAY SPIEGEL & ASSOCIATES

A handwritten signature in dark ink, appearing to read 'H. Jay Spiegel', is written over a horizontal line.

H. Jay Spiegel
Attorney for Opposer
THE VERMONT TEDDY BEAR COMPANY,
INC.
Registration No. 30,722

H. JAY SPIEGEL & ASSOCIATES
P.O. Box 11
Mount Vernon, Virginia 22121
(703) 619-0101 - Phone
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EXHIBIT 1

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

THE VERMONT TEDDY BEAR)	
COMPANY, INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 115,198
)	
BUILD-A-BEAR WORKSHOP, INC.,)	
)	
Applicant.)	

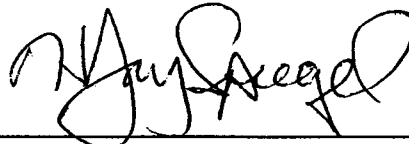
NOTICE OF DEPOSITION

PLEASE TAKE NOTICE that Opposer, The Vermont Teddy Bear Company, Inc., will take the deposition of Maxine Clark, President of Build-A-Bear Workshop, Inc., the Applicant in the above-captioned Opposition proceeding, on Tuesday, June 22, 2004, at the offices of BLACKWELL SANDERS PEPER MARTIN, 720 Olive Street, Suite 2400, St. Louis, MO 63101-2396, beginning at 9:00 a.m. The deposition shall be recorded by audio, video, and/or stenographic means.

Dated: April 16, 2004

Respectfully submitted,

H. JAY SPIEGEL & ASSOCIATES, P.C.



H. JAY SPIEGEL & ASSOCIATES
P.O. Box 11
Mount Vernon, VA 22121
(703) 619-0101 - Phone
(703) 619-0101 - Facsimile

By H. JAY SPIEGEL
Registration No. 30,722
Attorney for Opposer

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

THE VERMONT TEDDY BEAR
COMPANY, INC.,

Opposer,

v.

BUILD-A-BEAR WORKSHOP, INC.,

Applicant.

Opposition No. 115,198

CERTIFICATE OF SERVICE

Honorable Commissioner for Trademarks
2900 Crystal Drive
Box TTAB Fee
Arlington, Virginia 22202-3513

Sir:

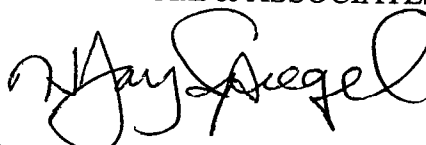
I hereby certify that a true copy of the foregoing NOTICE OF DEPOSITION was served by
First Class Mail, postage prepaid, this 16th day of April, 2004, on the following Attorney for
Applicant:

Michelle W. Alvey, Esquire
BLACKWELL SANDERS PEPER MARTIN
720 Olive Street, Suite 2400
St. Louis, MO 63101-2396.

DATED: April 16, 2004

Respectfully submitted,

H. JAY SPIEGEL & ASSOCIATES



H. JAY SPIEGEL & ASSOCIATES
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H. Jay Spiegel
Attorney for Opposer
THE VERMONT TEDDY BEAR COMPANY,
INC.
Registration No. 30,722

EXHIBIT 2

LAW OFFICES OF

H. JAY SPIEGEL & ASSOCIATES

GENERAL CAUSES &

PATENT, TRADEMARK & COPYRIGHT CAUSES

D.C. BAR
VIRGINIA BAR

PATENT BAR

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ALEXANDRIA, VIRGINIA 22308

MAIL ADDRESS: P.O. BOX 11

MOUNT VERNON, VIRGINIA 22121-0011

PARIS CORRESPONDENT

LANGER-NETTER-ADLER

53 AVENUE DE BRETEUIL

PARIS 75007 FRANCE

PHONE: 45 67 01 23

FACSIMILE: 45 67 33 86

May 5, 2004

Michelle Alvey, Esquire
BLACKWELL SANDERS PEPER MARTIN LLP
720 Olive Street, Suite 2400
St. Louis, MO 63101

Re: The Vermont Teddy Bear Co., Inc.
v. Build-A-Bear Workshop, Inc.
Opposition No. 115,198

Dear Ms. Alvey:

Please find enclosed herewith VTB's document production numbered VTB 00001 - 00107. I continue to seek confirmation of proposed dates for Elisabeth Robert's deposition and will let you know as soon as those dates have been obtained.

Very truly yours,

H. JAY SPIEGEL & ASSOCIATES



H. Jay Spiegel

HJS:tg
Enclosures

BLACKWELL SANDERS PEPER MARTINEXHIBIT 3

720 OLIVE STREET SUITE 2400 ST. LOUIS, MO 63101
TEL: (314) 345-6000 FAX: (314) 345-6060
WEBSITE: www.blackwellsanders.com

FACSIMILE COVER SHEET**DATE:** 05/13/2004**TIME:**

<u>RECIPIENT</u>	<u>FAX NUMBER</u>	<u>COMPANY/FIRM NAME</u>	<u>PHONE NUMBER</u>
H. Jay Spiegel, Esq.	(703) 619-0110	H. Jay Spiegel & Associates	

FROM: B. Michelle Alvey**DIRECT DIAL:** (314) 345-6488**DIRECT FAX:** (314) 345-6060**OPERATOR:** Robin Bryan**EXT. NO.:** 6604**BILLING CODE:** 713940-58576**TOTAL # OF PAGES:** 14**MESSAGE:**

PRIVILEGED AND CONFIDENTIAL information intended only for the use of the addressee(s) named above. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient(s), please note that any dissemination, distribution or copying of this communication is strictly prohibited. Anyone who receives this communication in error should notify us immediately by telephone and return the original message to us at the above address via the U.S. Mail.

STLD01-1064145-1

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SPRINGFIELD, MISSOURI • EDWARDSVILLE, ILLINOIS • WASHINGTON, D.C. • LONDON, UNITED KINGDOM
AFFILIATES: LEEDS • MANCHESTER • MEXICO CITY • MONTREAL • TORONTO • VANCOUVER

BLACKWELL SANDERS PEPER MARTIN
LLP

720 OLIVE STREET SUITE 2400 ST. LOUIS, MO 63101
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MICHELLE W. ALVEY
DIRECT: (314) 345-6488

FAX: (314) 345-6060
E-MAIL: malvey@blackwellsanders.com

May 13, 2004

VIA FACSIMILE AND REGULAR MAIL

H. Jay Spiegel, Esq.
H. Jay Spiegel & Associates
P.O. Box 11
Mt. Vernon, VA 22121

Re: *The Vermont Teddy Bear Co., Inc. vs. Build-A-Bear Workshop, Inc.*
Opposition No. 115,198

Dear Mr. Spiegel:

We write to you in a good faith effort to obtain complete responses to Build-A-Bear Workshop's First Set of Interrogatories and First Request for Documents Directed to Opposer Vermont Teddy Bear Co., Inc. ("VTB").

As the party opposing the registration of Build-A-Bear Workshop's Heart Mark, VTB bears the burden of proof and production in this matter. VTB asserts that it has evidence of trademark use prior to BABW. We appreciate your continued assistance in exchanging information regarding all relevant facts. However, we note that many of the answers to the discovery requests are either incomplete or ambiguous. In a good faith effort to obtain clear and complete answers to the propounded discovery, we have provided an outline of the issues.

INTERROGATORIES**INTERROGATORY NO. 1**

Interrogatory 1 requests the identity of all persons who provided information in connection with the Notice of Opposition.

While your answer to this interrogatory states that Courtney Griesser was the only person to provide information for the Notice of Opposition, your response to Interrogatory 7 indicates that Elisabeth Robert is the only person with knowledge of facts asserted in the Notice of Opposition and Ms. Robert executed the Verification. We note that Ms. Griesser is Assistant to the President,

STLD01-1076360-1 713940/58576

KANSAS CITY, MISSOURI • ST. LOUIS, MISSOURI • OVERLAND PARK, KANSAS • OMAHA, NEBRASKA
SPRINGFIELD, MISSOURI • EDWARDSVILLE, ILLINOIS • WASHINGTON, D.C. • LONDON, UNITED KINGDOM
AFFILIATES: LEEDS • MANCHESTER • MEXICO CITY • MONTREAL • TORONTO • VANCOUVER

BLACKWELL SANDERS PEPER MARTIN
LLP

H. Jay Spiegel, Esq.

May 13, 2004

Page 2

Elisabeth Robert, and assume she assisted Ms. Robert with the responses. However, it is not clear from your responses. Please confirm the persons that provided the information for the Notice of Opposition.

INTERROGATORY NO. 2

Interrogatory 2 requests the location where VTB has sold or offered for sale any of its goods and services using VTB's alleged heart as well as the people and documents relating to these alleged sales/offers.

First, VTB's response to Interrogatory No. 2 includes only information regarding the retail stores where VTB allegedly sold or offered for sale the goods or services that employ VTB's alleged heart. In VTB's other responses or previous statements, VTB claims use of VTB's alleged heart and sales of goods in methods such as mail order, websites, and toll-free numbers. We request that VTB disclose the information concerning all locations of sales or offers for sale—including the origin of the mail order, website, or telephone sales/offers.

Second, VTB indicates that VTB currently sells goods in the Factory Store in Shelburne, VT. However, the other accompanying list of locations with current sales includes a reference to Waterbury, VT. Please confirm whether VTB currently sells or offers for sale any goods or services in connection with the alleged heart in Waterbury, VT.

Third, your list includes only reference to sales or offers for sale of goods, but not services. Please confirm whether VTB offers services related to VTB's alleged heart in these locations and, if so, provide further information regarding such services as requested in the interrogatory.

INTERROGATORY NO. 3

Interrogatory 3 requests identification of each good or service offered in connection with VTB's alleged heart, as well as the date of first use; the duration of use; quantity of sales; geographic area for each use; marketing and distribution methods; the persons supervising the quality of the goods and services; and the persons with knowledge of the quality control for each good or service identified.

Since the response combines all of the alleged uses together rather than to identify them separately as requested, we request your assistance in confirming the information from your response as set out below.

BLACKWELL SANDERS PEPER MARTIN
LLP

H. Jay Spiegel, Esq.
May 13, 2004
Page 3

Identification of Goods and Services

Your response appears to state that there are three goods with which VTB has used VTB's alleged heart, namely, (1) MAFFL bears; (2) MAFFL kits; and (3) "finished" Teddy and Theo bears. Please confirm that this accurately states the information in your response. Further, please confirm the meaning of "finished" bears and whether the "MAFFL bears" are "finished" bears.

Dates of First Use

Your response appears to state that (1) the MAFFL bears first used the alleged heart in July 1996; (2) the MAFFL kits first used the alleged heart in "Fall" of 1996; and (3) the "finished" Teddy and Theo bears first used the alleged heart in "Fall" of 1996. Please confirm that this accurately states the information in your response. In addition, we ask that you provide more precise dates than mere "seasons" of the year.

Duration of Use

Your response appears to state that (1) the MAFFL bears first used the alleged heart in July 1996 and continue to use the heart; (2) the MAFFL kits first used the alleged heart in "Fall" of 1996 and ceased use in 1998; and (3) the "finished" Teddy and Theo bears first used the alleged heart in "Fall" of 1996 and ceased use in 1998. Please confirm that this accurately states the information in your response. In addition, we ask that you provide more precise dates than mere "seasons" of the year or the statement of an entire calendar year.

Quantity and Dollar Value of Sales

The refusal to produce such information, which is clearly relevant to VTB's claims in these proceedings, is without merit. See Trademark Trial and Appeal Board Manual of Procedure §414(18). Please supplement the answer and provide a complete response to this interrogatory.

Marketing Area for Each Year of Use

Your response appears to state that (1) use of the alleged heart in the MAFFL bears was marketed by VTB nationwide from Fall of 1996 to 1999 via catalog; (2) use of the alleged heart in the MAFFL kits was marketed nationwide by VTB from Fall of 1996 to 1998 via catalog; and (3) use of the alleged heart in the Teddy and Theo bears was marketed nationwide by VTB from Fall of 1996 to 1998 via catalog. Please confirm that this accurately states the information in your response.

BLACKWELL SANDERS PEPER MARTIN
LLP

H. Jay Spiegel, Esq.
May 13, 2004
Page 4

Marketing and Distribution Methods

Your response appears to indicate that VTB marketed "teddy bears with hearts in them" via catalog from 1996 to 1999. Please confirm that "teddy bears with hearts in them" refers to all three categories of goods noted above (MAFFL bears; MAFFL kits; and "finished" Teddy and Theo bears).

Your response appears to indicate that VTB marketed "teddy bears with hearts in them" via website since 1998. First, please confirm that "teddy bears with hearts in them" in this instance refers only to the MAFFL bears. In addition, we again note that the mere listing of an entire calendar year is not appropriate or sufficient in this instance where the exact dates of Vermont's alleged use are central to this Opposition.

Your response appears to indicate that VTB marketed "teddy bears with hearts in them" in Zainy Brainy stores from 1999 to 2000. First, please confirm that "teddy bears with hearts in them" in this instance refers only to the MAFFL bears. Second, identify how the goods were marketed in the stores. Finally, we again note that the mere listing of an entire calendar year is unacceptable.

Your response appears to indicate that VTB marketed "teddy bears with hearts in them" in store brochures from 1997 to present. First, please confirm that "teddy bears with hearts in them" in this instance refers only to the MAFFL bears. Second, identify how the goods were marketed by in store brochures. Finally, we again note that the mere listing of an entire calendar year is unacceptable.

As noted above, the responses given are either unclear. We request that you clarify your responses as outlined above.

INTERROGATORY NO. 5

Interrogatory 5 requests information regarding the date and manner of the first use of a brass heart by VTB (and related documents).

First, your response does not fully address the manner of the use. For example, your response does not state whether the brass heart is placed inside the bear, whether the brass heart is placed on the bear prior to sale, or whether the heart is used on the bear in retail outlets, catalog sales, and/or mail order. Please provide the information concerning the manner of use.

Second, we note that you did not identify any documentation relating to this use. Please confirm that you have no documentation of this alleged use.

BLACKWELL SANDERS PEPPER MARTIN
LLP

H. Jay Spiegel, Esq.
May 13, 2004
Page 5

Third, we note that you have only offered an approximate calendar year as the date of first use. The recital of an entire year is not sufficiently precise, especially when the date of Vermont's alleged first use of the heart is at issue. Please confirm the date of use with sufficient specificity.

INTERROGATORY NO. 6

Interrogatory 6 requests information regarding the date and manner of the first use of a red felt heart by VTB (and related documents).

First, as with Interrogatory 5, your response does not fully address the manner of the use. Please provide the information concerning the manner of use.

Second, we note that you did not identify any documentation relating to this use. Please confirm that you have no documentation of this alleged use.

INTERROGATORY NO. 7

Please see our questions and concerns regarding Interrogatory 1.

INTERROGATORY NO. 9

Interrogatory 9 requests information regarding the nature and substance of the knowledge of each person listed in Interrogatories 7 and 8.

Interrogatory 7 requests identification of the person(s) with knowledge of VTB's allegation in the Notice of Opposition that VTB was the first user of the trademark and service mark identified in BABW's application. Your response to Interrogatory 9 does not provide any information regarding the specific nature and substance of knowledge relating to this claim. We are not requesting all details regarding the facts supporting VTB's claims. Rather, we are simply seeking the general category of information known by each person listed by VTB. As such, we request that you provide a full and complete answer to the Interrogatory.

Similarly, Interrogatory 8 requested identification of the person(s) with knowledge regarding any such claim of prior use of VTB's alleged heart that allegedly occurred before the use by BABW. Your response to Interrogatory 9 does not provide the nature and substance of the knowledge claimed in your response to Interrogatory 8. Rather, VTB simply gives a job description for each person. Additionally, VTB notes "documentation" to prove trademark use of "the heart in

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the bear" as early as summer of 1996. However, VTB fails to identify or provide any such "documentation".

INTERROGATORY NO. 10

Interrogatory 10 requests information regarding the areas of distribution for VTB's goods and services.

The response to Interrogatory 10 is incomplete or ambiguous for several reasons. First, VTB states that distribution "is" nationwide via catalog sales for Make A Friend For Life kits. However, in other responsive discovery, VTB claimed that the kits are no longer offered. Please confirm that these kits are, in fact, no longer offered or sold—in any area of the country.

Second, VTB states that distribution is made via in-store sales of the bears. Again, the other interrogatory responses indicate that such bears are only sold in Vermont. Please confirm that bears (with the alleged heart) are, in fact, only sold in Vermont—if at all.

INTERROGATORY NO. 11

Interrogatory 11 requests information regarding the areas of use and distribution for VTB's goods and services where use of the alleged heart has been discontinued.

VTB's other interrogatory responses make it clear that they no longer operate stores in New York, New Hampshire, and Maine. As such, we request that VTB fully answer the proposed interrogatory with respect to each of the areas where VTB ceased use of the alleged heart.

INTERROGATORY NO. 12

Interrogatory 12 requests information regarding the development and selection of VTB's alleged heart as a trademark as well as the nature and dates of such actions.

First, VTB asserts that Kathleen Straube and Robert Delsandro "developed this mark" without any mention of the nature of the work performed by either of them. In addition, this response does not include dates of their respective actions. Please provide a complete answer to this interrogatory.

Second, VTB asserts Attorney-Client privilege and the work product rule as a defense to the disclosure of the requested trademark, trade dress, and design searches. It is well settled that trademark search reports are NOT privileged. *See American Optical Corp. v. Exomet, Inc.* 181

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USPQ 120 (TTAB 1974). Further, there is no support for the contention that the identities of the persons performing the searches are privileged. As such, we request full disclosure with respect to this interrogatory.

INTERROGATORY NO. 13

Interrogatory 13 requests information regarding advertising and promotion of VTB's alleged heart. VTB's response is inadequate for several reasons.

First, VTB asserts that VTB creates and controls all of its own advertising and promotions. However, VTB fails to identify the persons that performed such work as well as the corollary information about each such person specifically requested in the interrogatory. Please provide this information as requested.

Second, VTB indicates that "numerous catalogs" were produced from 1996 to 1998. However, VTB fails to identify such catalogs, fails to identify the persons that worked on such catalogs, fails to state the nature of the work, and fails to provide dates for the individual catalogs.

Third, VTB makes reference to in-store promotions since 1996. However, VTB fails to identify such promotions, fails to identify the persons that worked on such promotions, and fails to provide dates for the individual promotions.

Fourth, VTB makes reference to website promotions since 1998. However, VTB fails to identify such promotions, fails to identify the persons that worked on such promotions, fails to state the nature of the work, and fails to provide dates for the individual promotions.

Fifth, while VTB makes general references to advertising and promotions, VTB does not address any changes or amendments to the advertising and promotions. Thus, we ask for confirmation that no such changes or amendments were made to any advertising or promotion by VTB.

We request a full and complete response to this interrogatory.

INTERROGATORY NO. 14

Interrogatory 14 requests information regarding the expenses for advertising and promotion.

Your response fails to adequately address this interrogatory. You previously stated that the advertising and promotion work was done in-house and, thus, the information should be readily

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available to VTB. Further, if VTB wishes to produce documentation of its total advertising and promotion expenses—including those not related only to the use of the alleged heart—that may be acceptable, provided that the information is subject to reasonable interpretation and approximation of the advertisements and promotions relevant to this opposition.

INTERROGATORY NO. 15

Interrogatory 15 requests specific information about each advertisement or promotion on behalf of VTB in connection with use of the alleged heart.

While VTB indicated it would produce responsive documents, VTB's recent document production does not include such information.

INTERROGATORY NO. 16

Interrogatory 16 requests specific information on advertisements and promotions of VTB that use "look for" advertising or other such similar style of advertising to distinguish VTB's goods and services by use of the alleged heart.

Your response appears to reference two advertisements: VTB's website and the logo used in connection with Make A Friend For Life. Please confirm that we have correctly interpreted your identification of the advertisements that are relevant to this interrogatory and also, provide the date(s) of such advertisements or produce documents reflecting such dates.

INTERROGATORY NO. 17

Interrogatory 17 requests identity of persons with knowledge of distribution and sales of goods and services.

Your response includes a reference that "[d]uring the entire period, the goods and services have been sold and distributed in Opposer's catalogs. Please clarify this statement regarding the sales and distribution of goods and services "in" catalogs.

Since you claim that goods and services are sold "in" catalogs, there must necessarily be some method of distribution of the goods and services to the persons that place orders based on the catalog. This interrogatory simply seeks to identify the person with primary responsibility for this sales and distribution of the relevant goods and services.

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INTERROGATORY NO. 18

Interrogatory 18 requests that VTB disclose round numbers related to gross sales for their goods and services. Clearly the amount of sales and revenue with respect to your alleged use of the heart is relevant to the Opposition. See Trademark Trial and Appeal Board Manual of Procedure §414(18). Your refusal to produce such information is without merit.

Please supplement VTB's answer and provide a complete response to this interrogatory.

INTERROGATORY NO. 27

Interrogatory No. 27 requests identification of any person who answered or assisted in the preparation of the responses to these interrogatories—and reference to the specific interrogatories to which they contributed.

VTB's response includes only the name of Courtney Grisser. However, Elisabeth Robert is identified as the only person with knowledge of facts asserted in the Notice of Opposition and Ms. Robert executed the verification. Thus, we assume she assisted with the answers to these interrogatories. Please confirm that VTB has so identified all the persons that contributed to this set of responses along with an indication of the number of each interrogatory for which they provided information.

REQUESTS FOR DOCUMENTS

Offer of "Representative Samples" or "Samplings":

We note that your responses to Requests 2, 8, 14, 30, and 32 indicate that VTB will provide a "representative sample" or a "representative sampling" of the various documents requested.

The discovery guidelines permit for the production of a representative sample only when the full production of all relevant documents would be overly burdensome and when a reduced amount of information is sufficient to meet the propounding party's discovery needs. See TBMP §414(2).

VTB's alleged prior use of the heart as a trademark is the central issue in these proceedings. Production of all documentation of VTB's alleged use and promotion should not be burdensome and there is no indication that the provided "samples" are sufficient to meet the needs of BABW to examine the alleged use of a heart by VTB. Thus, we request that VTB produce all documents concerning the alleged use and promotion of a heart located inside a stuffed or plush toy animal.

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Request 8 seeks production of representative samples of each use, expected use, former use or claim of use of VTB's alleged heart. Rather than a representative sample of each such instance of use, we appear to have received only a couple of catalogs from you.

VTB's previous discovery responses indicate at least a few allegations of use. In addition, your Notice of Opposition includes an allegation that VTB "markets" its bears by mail order, 1-800 numbers, in retail stores, and through a web page. Despite these alleged instances of use by VTB, the documents include only isolated catalogs and do not reflect each use alleged by VTB.

We request that VTB provide all requested documentation concerning VTB's alleged use of the heart as a trademark, which VTB claims as the basis of this Opposition. In the event that VTB fails to make such disclosure, we will seek appropriate relief from the TTAB.

INDIVIDUAL REQUESTS

REQUEST NO. 1

Request No. 1 seeks all documents identified in response to BABW's First Set of Interrogatories. Thus far, VTB has failed to properly identify any documents in the interrogatory answers as we have requested. We maintain this request for the documents.

REQUEST NO. 2

See comments above regarding representative samples.

REQUEST NO. 4

Request No. 4 seeks all documents relating to other uses of a heart in a toy that are known to VTB. VTB indicated that VTB would produce relevant documents. Upon review of your documents numbered VTB 00001-00107, we do not find any documents responsive to this request. As such, we request that you confirm that no such documents exist or supplement the document production accordingly.

REQUEST NO. 7

Request No. 7 seeks all documents relating to the creation, selection, and adoption of VTB's alleged heart. VTB indicated that VTB would produce documents demonstrating VTB's first use of "THE HEART IN THE BEAR" mark.

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First, we renew the request for all documents concerning the creation, selection, and adoption of VTB's alleged heart. While the information concerning the date of first use is certainly appreciated, we also want the documentation concerning the creation, selection, and adoption of the alleged mark. If no such documentation exists, we ask that you confirm that you have no such documentation.

Second, upon review of your documents numbered VTB 00001-00107, we do not find any documents that demonstrate VTB's alleged first use. Since you believe that these documents definitively demonstrate VTB's first use, we ask that you identify the date of the use and the corresponding bates numbered document that demonstrates this alleged date of first use.

REQUEST NO. 8

See discussion above regarding representative samples.

REQUEST NO. 9

Request No. 9 seeks documentation of annual sales for products bearing VTB's alleged heart since the first sale. VTB agreed to provide this information upon entry of a protective order. The stipulated protective order was submitted on April 22, 2004. As such, we renew this request and seek the documentation of sales.

REQUEST NO. 13

Request No. 13 seeks documentation of annual marketing expenses for products bearing VTB's alleged heart. VTB agreed to provide this information upon entry of a protective order. The stipulated protective order was submitted on April 22, 2004. As such, we renew this request and seek the promised documentation of marketing expenses.

REQUEST NO. 14

See discussions above regarding representative samples.

REQUEST NO. 24

Request No. 24 seeks documentation regarding each location where VTB sells goods or service in connection with VTB's alleged heart. Upon review of your documents numbered VTB 00001-00107, we do not find any documents responsive to this request addressing locations of use.

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As such, we request that you confirm that no such documents exist or supplement the document production accordingly.

REQUEST NO. 26

Request No. 26 seeks documentation regarding area of distribution for goods or service in connection with VTB's alleged heart. Upon review of your documents numbered VTB 00001-00107, we do not find any documents responsive to this request addressing areas of distribution. As such, we request that you confirm that no such documents exist or supplement the document production accordingly.

REQUEST NO. 27

Request No. 27 seeks documentation regarding any discontinuance of use. VTB indicates that there are no such documents.

VTB's previous interrogatory responses have already stated that VTB closed as many as 15 stores or in-store locations that allegedly used the VTB's alleged heart. Thus, we request that VTB provide all documentation relating to or reflecting any such discontinued use.

REQUEST NOS. 29 AND 31

Requests 29 and 31 ask for documents relating to the first use of a brass heart and a felt heart, respectively.

VTB notes that while documents will be produced, VTB cannot state with certainty that the documents reflect first use of either heart. Clearly, such information is relevant to VTB's claims in these proceedings. Please confirm that VTB has no affirmative or first-hand knowledge that the individual documents produced in response to these requests reflect the first use date of any heart and that any attempted entry or use of such the documents with respect to proof the first use date can and shall properly be denied and the evidence excluded. In the absence of your agreement to these terms, we renew the request for the full disclosure of documents as stated in the formal requests.

REQUEST NO. 30

See discussion above regarding representative samples.

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LLP

H. Jay Spicgel, Esq.
May 13, 2004
Page 13

REQUEST NO. 32

See discussion above regarding representative samples.

REQUEST NO. 35

Request No. 35 seeks documentation regarding any materials that specifically draw attention to VTB's alleged heart in a manner designed to distinguish VTB's goods or services. Upon review of your documents numbered VTB 00001-00107, we do not find any documents responsive to this request addressing "look for advertising" or any other such documentation. As such, we request that you confirm that no such documents exist or supplement the document production accordingly.

We look forward to receiving your complete responses to the discovery requests. Please contact Anthony Martin or me if you have any questions.

Very truly yours,



Michelle W. Alvey

MWA/mb

EXHIBIT 4

LAW OFFICES OF

H. JAY SPIEGEL & ASSOCIATES

GENERAL CAUSES &

PATENT, TRADEMARK & COPYRIGHT CAUSES

PARIS CORRESPONDENT
LANGER-NETTER-ADLER
53 AVENUE DE BRETEUIL
PARIS 75007 FRANCE
PHONE: 45 67 01 23
FACSIMILE: 45 67 33 86

D.C. BAR
VIRGINIA BAR
PATENT BAR
PHONE: (703) 619-0101
FAX: (703) 619-0110
WIRELESS: HJS@SPIEGELAW.COM
WWW.SPIEGELAW.COM
E-MAIL: JAYSPIEGEL@AOL.COM

SPIEGEL'S LANDING
8778 THOMAS J. STOCKTON PARKWAY
ALEXANDRIA, VIRGINIA 22308

MAIL ADDRESS: P.O. BOX 11
MOUNT VERNON, VIRGINIA 22121-0011

May 14, 2004

Michelle Alvey, Esquire
BLACKWELL SANDERS PEPER MARTIN LLP
720 Olive Street, Suite 2400
St. Louis, MO 63101

VIA FACSIMILE

Re: The Vermont Teddy Bear Co., Inc.
v. Build-A-Bear Workshop, Inc.
Opposition No. 115,198

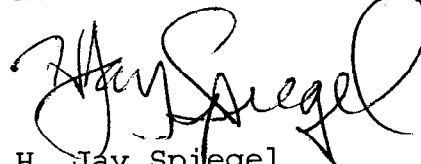
Dear Ms. Alvey:

We acknowledge receipt of your letter of May 13, 2004, concerning VTB's responses to Interrogatories and Document Requests. I have forwarded your letter to VTB with the request that they get back to me next week. I will make all best efforts to provide responses to all of your concerns as soon as possible, preferably by the end of next week or sometime the following week. Of course, this would be well in advance of Ms. Robert's Deposition.

Please let me know if you have any questions.

Very truly yours,

H. JAY SPIEGEL & ASSOCIATES


H. Jay Spiegel

HJS:tg

cc: The Vermont Teddy Bear Co., Inc.

BLACKWELL SANDERS PEPPER MARTIN
LLP

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TEL: (314) 345-6000 FAX: (314) 345-6060
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ANTHONY MARTIN
DIRECT: (314) 345-6202

FAX: (314) 345-6060
E-MAIL: amartin@blackwellsanders.com

June 4, 2004

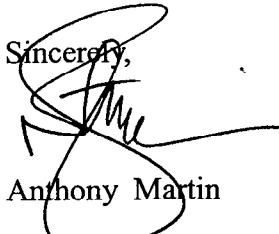
H. Jay Spiegel, Esq.
H. Jay Spiegel & Associates
Spiegel's Landing
8778 Thomas J. Stockton Parkway
Alexandria, Virginia 22121-0011

Re: *The Vermont Teddy Bear Co., Inc. vs. Build-A-Bear Workshop, Inc. Opposition*
No. 115,198

Mr. Spiegel:

Documents responsive to your discovery requests accompany this letter and are numbered BABW-VTB-370 through 826. Call or e-mail me if you have any questions.

Sincerely,



Anthony Martin

ACM:pb

Enclosures

EXHIBIT 6

LAW OFFICES OF

H. JAY SPIEGEL & ASSOCIATES

GENERAL CAUSES &

PATENT, TRADEMARK & COPYRIGHT CAUSES

PARIS CORRESPONDENT
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ALEXANDRIA, VIRGINIA 22308

MAIL ADDRESS: P.O. BOX 11
MOUNT VERNON, VIRGINIA 22121-0011

June 14, 2004

Michelle Alvey, Esquire
BLACKWELL SANDERS PEPER MARTIN LLP
720 Olive Street, Suite 2400
St. Louis, MO 63101

VIA FACSIMILE

Re: The Vermont Teddy Bear Co., Inc.
v. Build-A-Bear Workshop, Inc.
Opposition No. 115,198

Dear Ms. Alvey:

I am writing to respond to the telephone conversation we had earlier this afternoon. As I mentioned, and as I have previously mentioned, I am endeavoring to respond to your letter of May 13, 2004, concerning what you allege to be deficiencies in VTB's Interrogatory answers and document production. I fully expect to be able to provide the requested responses including supplemental discovery responses and additional document production sometime this week.

Accordingly, I was taken aback by the information that you intend to file a Motion for Summary Judgment this week. The delay in responding to your letter is attributable to the fact that this time of year is extremely busy at VTB considering the Mother's Day and Father's Day holidays as well as graduation ceremonies, all of which make it difficult to obtain access to VTB's employees so that the supplemental discovery can be produced. The discovery that has already been produced was based upon VTB's good faith understanding of the Interrogatories and Document Requests. When those discovery requests are taken in conjunction with your letter of May 13, 2004, it is apparent that you believe VTB's production to be deficient. We expect to fully address your concerns.

One would think that a party would wait to file a Motion for Summary Judgment until such time as they have received sufficient discovery to determine whether there is a basis to support the Motion. Such a decision would preclude wasting the valuable resources of the Trademark Trial and Appeal Board reviewing and deciding upon Motions that should not have been filed.

Michelle Alvey, Esquire
June 14, 2004
Page 2

We fully expect to depose Maxine Clark next Tuesday and presume that you will inform her of our intention. VTB has expended considerable sums of money preparing for this deposition and will resist any effort by BABW to delay it.

Very truly yours,

H. JAY SPIEGEL & ASSOCIATES

A handwritten signature in cursive script, appearing to read "H. Jay Spiegel".

H. Jay Spiegel

HJS:tg

cc: The Vermont Teddy Bear Co., Inc.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of:

Trademark Application Serial No.	75/434,462
Filed	February 13, 1998
For the Mark	"BEAR DESIGN"
Published in the Official Gazette	on July 13, 1999 at TM 77

THE VERMONT TEDDY BEAR COMPANY,)	
INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 115,198
)	
BUILD-A-BEAR WORKSHOP, INC.,)	
)	
Applicant.)	

DECLARATION OF COURTNEY GRIESSER

The undersigned, Courtney Griesser, makes the following declaration:

(1) That I am the Assistant to the President of The Vermont Teddy Bear Company, Inc. (VTB or Opposer), Opposer in the above-captioned Opposition proceeding;

(2) That in this connection, I am VTB's direct contact with our Trademark Counsel, H. Jay Spiegel, concerning the above-captioned Opposition proceeding;

(3) That in mid-May, I received from Mr. Spiegel a copy of a letter dated May 13, 2004, from the Counsel to Build-A-Bear Workshop, Inc. (BABW or Applicant) which requested clarifications of the discovery VTB had produced to that date in the Opposition proceeding;

(4) That the time period from mid-May to the end of June is one of the busiest times of the year for Opposer with teddy bear orders significantly increasing due to the Mother's Day and Father's Day holidays, and the numerous school graduations that occur during this time of year;

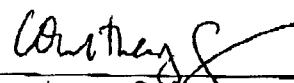
(5) That during this time of year, the workload of the VTB staffpersons who must assist me in searching for documents increases significantly, and, as such, VTB has been unable to complete the search for documents necessary to satisfy the concerns expressed in BABW's Counsel's letter of May 13, 2004;

(6) That VTB fully intends to satisfy BABW's concerns regarding discovery production as soon as is practicable.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

Respectfully submitted,

6.17.04
DATE



Courtney Griesser
Assistant to the President
of Opposer
THE VERMONT TEDDY BEAR COMPANY,
INC.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of:	
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THE VERMONT TEDDY BEAR COMPANY,)	
INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 115,198
)	
BUILD-A-BEAR WORKSHOP, INC.,)	
)	
Applicant.)	

DECLARATION OF H. JAY SPIEGEL

The undersigned, H. Jay Spiegel, makes the following declaration:

(1) That I am Counsel to The Vermont Teddy Bear Company, Inc. (VTB or Opposer), Opposer in the above-captioned Opposition proceeding;

(2) That as Counsel to Opposer, I have been endeavoring to respond to the discovery requests of Build-A-Bear Workshop, Inc. (BABW or Applicant), Applicant in the above-captioned Opposition proceeding;

(3) That I received a letter from Applicant's Counsel dated May 13, 2004, requesting clarifications to discovery previously produced, and I promptly forwarded the letter to VTB with the

request and began contacting the Assistant to the President of VTB, Courtney Griesser, to request responses to the issues raised in Applicant's Counsel's above-identified letter;

(4) That I am aware that the time period from mid-May until the end of June is one of the busiest times of the year for Opposer due to the high volume of teddy bear orders Opposer receives coincidental to the Mother's Day and Father's Day holidays as well as the numerous school graduation ceremonies that occur during that time of year;

(5) That on more than one occasion, at least once by letter and more than once by telephone, I communicated with Applicant's Counsel to express Opposer's clear intent to fully respond to the requests set forth in Applicant's Counsel's letter of May 13, 2004, and that, during those telephone conversations, I explained the reasons why this busy time of year had resulted in unfortunate, but unintentional, delays;

(6) That on June 14, 2004, I received a telephone call from Applicant's Counsel, Michelle Alvey, in which Ms. Alvey expressed her intent to file on behalf of Applicant a Motion for Summary Judgment alleging that Opposer's use of its claimed mark involving placing a heart into the chest of a teddy bear was merely ornamental or decorative use, not rising to the level of Trademark use, and that during the conversation, I explained that I believed the filing of the Motion was inappropriate at this time given VTB's

clear intention to provide supplemental discovery in the near future;

(7) That on June 15, 2004, I received service of Applicant's Motion for Summary Judgment and the accompanying Memorandum and Exhibits;

(8) That after reviewing the papers received on June 15, 2004, I realized that in order to be able to adequately respond to Applicant's Motion for Summary Judgment on behalf of Opposer, I would need to elicit certain information from Applicant's President, Maxine Clark, and that a deposition of Ms. Clark had been noticed about 2 months earlier, to be held in St. Louis on June 22, 2004, beginning at 9:00 AM, in the offices of Applicant's Counsel;

(9) That the information I would need to elicit from Ms. Clark includes the following:

(a) Information concerning the manner by which Applicant has used the mark for which Applicant filed Application Serial No. 75/434,462, which application is the subject of this Opposition proceeding. Such information will enable Opposer to compare the way Applicant claims it uses the heart in the bear concept, which Applicant claims is Trademark use, with the way Opposer uses the heart in the bear concept which Applicant contends in its Motion for Summary Judgment is not Trademark use. Such comparison will

enable Opposer to test the credibility of Applicant's contention that Opposer's use of the mark is not Trademark use, but consists of merely ornamentation or decoration;

(b) Information concerning the precise circumstances under which Applicant allegedly created their mark, adopted it, and began to use it. In this regard, Opposer believes that Applicant knew of Opposer's use of the heart in the bear mark at the time when Applicant began using the heart in the bear mark itself. Such information clearly has a bearing on whether Opposer's use of the heart in the bear mark is, in fact, Trademark use as explained in Section 7:34 of *McCarthy on Trademarks* and *O. & W. Thum Co. v. Dickinson*, 245 F. 609, 614 (6th Cir. 1917);

(10) That when Opposer succeeds in deposing Ms. Clark concerning these subjects, the information elicited, combined with discovery already produced by Applicant, will permit Opposer to adequately respond to the Motion for Summary Judgment.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made

of his/her own knowledge are true; and all statements made on information and belief are believed to be true.

Respectfully submitted,

H. JAY SPIEGEL & ASSOCIATES

A handwritten signature in black ink, appearing to read "H. Jay Spiegel", written over a horizontal line.

H. Jay Spiegel
Attorney for Opposer
THE VERMONT TEDDY BEAR COMPANY,
INC.

Registration No. 30,722

6/17/04

DATE

H. JAY SPIEGEL & ASSOCIATES
P.O. Box 11
Mount Vernon, Virginia 22121
(703) 619-0101 - Phone
(703) 619-0110 - Facsimile

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of:	
Trademark Application Serial No.	75/434,462
Filed	February 13, 1998
For the Mark	"BEAR DESIGN"
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THE VERMONT TEDDY BEAR COMPANY,)	
INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 115,198
)	
BUILD-A-BEAR WORKSHOP, INC.,)	
)	
Applicant.)	

[FIRST PROPOSED] ORDER

The Trademark Trial and Appeal Board having considered The Vermont Teddy Bear Company, Inc.'s (Opposer) Opposer's Emergency Motion to Permit Further Discovery Pursuant to Fed.R.Civ. P56(f) to Facilitate Response to Motion for Summary Judgment and Request for Extension of Deadline to Respond to Motion for Summary Judgment, and any opposition thereto from Applicant, Build-A-Bear Workshop, Inc. (BABW),

IT IS HEREBY ORDERED that Opposer's Motion is granted.

The Deposition of Maxine Clark already scheduled for June 22, 2004, shall be conducted as scheduled with no limitation as to the subjects germane to the Opposition proceeding that are examined; and

FURTHER, IT IS ORDERED that Opposer shall have to and including Friday, July 16, 2004, to file and serve a response to

Applicant's Motion for Summary Judgment that was filed on June 15,
2004.

For The Trademark Trial and Appeal Board

Date

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of:	
Trademark Application Serial No.	75/434,462
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THE VERMONT TEDDY BEAR COMPANY,)	
INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 115,198
)	
BUILD-A-BEAR WORKSHOP, INC.,)	
)	
Applicant.)	

[SECOND PROPOSED] ORDER

The Trademark Trial and Appeal Board having considered The Vermont Teddy Bear Company, Inc.'s (Opposer) Opposer's Emergency Motion to Permit Further Discovery Pursuant to Fed.R.Civ. P56(f) to Facilitate Response to Motion for Summary Judgment and Request for Extension of Deadline to Respond to Motion for Summary Judgment, and any opposition thereto from Applicant, Build-A-Bear Workshop, Inc. (BABW),

IT IS HEREBY ORDERED that Opposer's Motion is granted.

The Deposition of Maxine Clark already scheduled for June 22, 2004, shall be conducted as scheduled, however, the subject matter of the Deposition shall be limited to those subjects set forth in the Declaration of H. Jay Spiegel that have been identified by Opposer as subjects for which discovery must be elicited from

Maxine Clark in order that Opposer can respond to the pending Motion for Summary Judgment;

IT IS FURTHER ORDERED that should Applicant's Motion for Summary Judgment, currently pending, be denied, Opposer shall be permitted to further depose Maxine Clark in the metropolitan area of Washington, D.C. on a date and at a place and time mutually agreed upon between the parties during the extended period for discovery, so that Opposer can depose Ms. Clark concerning subjects germane to the Opposition proceeding for which Opposer was forbidden, by the Board, to inquire during the deposition of June 22, 2004.

FURTHER, IT IS ORDERED that Opposer shall have to and including Friday, July 16, 2004, to file and serve a response to Applicant's Motion for Summary Judgment that was filed on June 15, 2004.

For The Trademark Trial and Appeal Board

Date

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

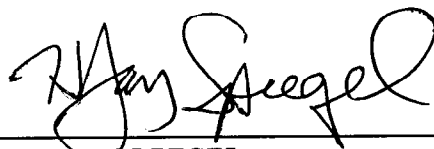
In the matter of:	
Trademark Application Serial No.	75/434,462
Filed	February 13, 1998
For the Mark	"BEAR DESIGN"
Published in the Official Gazette	on July 13, 1999 at TM 77

THE VERMONT TEDDY BEAR COMPANY,)	
INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 115,198
)	
BUILD-A-BEAR WORKSHOP, INC.,)	
)	
Applicant.)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing OPPOSER'S EMERGENCY MOTION TO PERMIT FURTHER DISCOVERY PURSUANT TO FED.R.CIV. P56(f) TO FACILITATE RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR EXTENSION OF DEADLINE TO RESPOND TO MOTION FOR SUMMARY JUDGMENT, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSER'S EMERGENCY MOTION TO PERMIT FURTHER DISCOVERY PURSUANT TO FED.R.CIV. P56(f) TO FACILITATE RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR EXTENSION OF DEADLINE TO RESPOND TO MOTION FOR SUMMARY JUDGMENT, DECLARATION OF COURTNEY GRIESSER, DECLARATION OF H. JAY SPIEGEL, [FIRST PROPOSED] ORDER, and [SECOND PROPOSED] ORDER were forwarded this day, June 17, 2004, via Facsimile to (314) 345-6060, and via U.S. First Class Mail, postage

prepaid, to Michelle Alvey, Esquire, and Anthony Martin, Esquire,
Counsels for Applicant, BLACKWELL SANDERS PEPER MARTIN LLP, 720
Olive Street, Suite 2400, St. Louis, Missouri 63101.

A handwritten signature in black ink, appearing to read "H. Jay Spiegel", written over a horizontal line.

H. JAY SPIEGEL
Attorney for Opposer
THE VERMONT TEDDY BEAR COMPANY,
INC.

June 17, 2004

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